IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 185 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

A M SHAH & COMPANY

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

MR SN SOPARKAR with MR MK KAZI,
Advocate for Petitioner
MR MJ THAKORE, with MR MANISH R BHATT
Advocates for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

Date of decision: 29/08/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Income Tax Appellate Tribunal, Ahmedabad Bench "A", has referredthe following questions for the

opinion of this Court under Section 256(1) of the Income Tax Act, 1961.

Assessment Year 1970-71:

(1) "Whether on the facts and circumstances of the case the Tribunal was right in law in upholding levy of penalty in respect of additions mentioned hereunder:-

(a) in respect of addition of Rs. 6,396.00

(b) In respect of addition of Rs. 37,535.00 out of Rs. 52,535.00 being addition restored by the Tribunal though deleted by the AAC."

Assessment Year 1971-72:

"Whether on facts and in the circumstances of the case the Tribunal was justified in law in upholding penalty of Rs. 1,16,754.00 under the provisions of Section 271(1)(c) of the Act."

Assessment Years 197-71 and 1971-72:

(1) "Whether on the facts and circumstances of the case the Tribunal was right in law in upholding the order of the IAC imposing penalty on the ground that the assessee has concealed the particulars of income, furnished inaccurate particulars of income within the meaning of Section 271 (1)(c) of the Act or in the alternative was liable to penalty on the ground that there was gross or wilful neglect on the part of the assessee in not disclosing the correct income within the meaning of Explanation to Section 271(1)(c) of the Act"

(2) "Whether the Tribunal was right in upholding the order of the IAC on the ground that the directions issued by the IAC to the ITO to impose penalty was not fatal to the penalty proceedings for both the years."

2. The assessee is a firm which, at the relevant time, carried on business in purchase and sale of ball bearings, mill stores etc. on retail basis. For the Assessment Year 1970-71, the assessee had disclosed the sales of Rs. 2,78,426.00 with gross profit of 23 per

cent. The ITO subjected the books of account of the assessee to a detailed scrutiny and as a result, found that there were substantial discrepancies by way of manipulation of stocks, omission of sales, inflation of purchases, making out of bogus bills etc. He accordingly brought to tax a sum of Rs. 1,72,775.00 by his assessment order dated 31st August, 1973, as per the details mentioned in the order. Out of the seven items mentioned and which are reproduced by the Tribunal in its order, we are concerned for the purpose of the present proceedings, with the item of cash purchase without proof, of Rs. 9,987.00, which was at serial No.3 and the item of Rs. 37,535.00, which was at serial No.5, which related to under-statement of the closing stock. The ITO, by that order, initiated action for imposition of penalty under Section 271(1)(c) of the Act and referred the matter to the IAC for further imposition of penalty. In appeal, the AAC by his order dated 2.2.1974, upheld certain additions including Rs. 6,396.00 out of the addition of Rs. 9,987.00 and deleted other additions including the amount of Rs. 37,535.00, which related to under statement of closing stock. In the further appeal before the Tribunal in those quantum proceedings, the Tribunal by its order dated 7th March, 1980, upheld the additions which were sustained by the AAC and restored the addition of Rs. 37,535.00 of the said item No.5, which was deleted by the AAC. Over and above this, the Tribunal also made an addition of Rs. 15,000.00 on the basis that since the purchases were not traceable in the closing stock and sales, the natural inference was that the goods have been sold outside the books and since the price at which they were sold was not known, the Tribunal made the addition on account of the realisable profit on these purchases arriving at the estimated figure of Rs. 15,000.00 and thus, while sustaining the addition to the extent of Rs. 37,535.00 with which we are concerned in these proceedings, adding a further sum of Rs. 15,000.00, which admittedly is not the subject matter of the present proceedings.

3. The IAC to whom the matter was referred by the ITO, who initiated action for imposition of penalty under Section 271(1)(c) of the Act, took up the matter for his consideration for imposition of penalty after the decision of the Tribunal in the quantum proceedings was received. In order to bring to forefront the basis on which the penalty proceedings were initiated by the ITO, we may at this stage refer to the assessment order in respect of the said year 1970-71 made by the ITO on 31.3.1973, which is at annexure "D" in the paper book. In this assessment order, the ITO has, in details, noted

the discrepancies and referred to the doubtful purchases made from various parties and to the fact that for reasons mentioned in paragraph 3 thereof, the books of accounts were impounded and the stock was got reconstructed brand-wise with the help of the accountants of the assessee.

In respect of the cash purchases, while referring to the item of Rs. 9,984.00 relating to 31 cash purchases, it was observed that there were no memos or vouchers, no details as to the nature of goods and no receipts for the payment of the same. It was noted that the assessee's only explanation was that the purchases were genuine, but through oversight, the vouchers were not prepared. The ITO held that obviously this was not a valid explanation and thus, there was no proof or explanation for such purchases.

As regards the additions made on account of the value of the stock not being included in the closing stock, which is relatable to the item of Rs. 37,535.00, the ITO first noted the discrepancies in the stock book as stated in paragraph 5 of his order, observing that the scrutiny of reconstructed stock book revealed that there were many sales for which there was no opening stock or corresponding purchases, the doubtful and cash purchases mostly appeared thereafter and after taking out excess sales and adjusting the purchases made thereafter against the sales, it appeared that there remained many items in the stock which were not shown in the closing stock for which there were no purchases. It was observed that a brandwise statement was prepared and checked with the assessee as per the Annexure to the order. The ITO noted that the list of closing stock was at the end of the ledger and observed that discrepancies were brought to the notice of the assessee by letter dated 18.11.1972, to which a reply was sent on 28.11.1972 stating that the assessee had to sell the goods and prepare the sale bills earlier while the purchase bills were received thereafter. It was observed that the assessee was unable to produce any evidence to show that in fact, he had received goods earlier on approval basis. It was also observed that there were in fact cash purchases without names on a large scale and doubtful purchases from four parties to the extent of Rs. 28,774.00 and Rs. 96,148.00 respectively. The explanation given by the assessee was found to be flimsy and not acceptable. As regards the other explanation regarding the group of brands, it was held that, that was also not acceptable as it was against the entries in the stock book of the assessee itself where brands are mentioned for each

purchases and sale with different rates. It was observed that the assessee had with his letter dated 29.3.1973 given a quantity statement not grouping the brands but grouping several numbers including all the brands of each number together and thus, the assessee himself was not in a position to tally the quantity of a given number grouping several brands thereof. It was held that the explanation of the assessee was false as per the assessee's own quantity statement filed on 29.3.1973. It was therefore held that there were sales of Rs. 81,731.00, for which there were no details of acquisition and further that there were items costing Rs. 68,087.00, which should have been shown in the closing stock but had not been shown, as well as items shown in the closing stock costing Rs. 11954.00, which did not come from any opening stock or purchases. The ITO in his conclusions, while referring to the item not shown in the closing stock by the assessee to the tune of Rs. 68,067.00 (Clause 9 of Annexure attached with the order) found that the unexplained purchases came to Rs. 30,532.00 (as per Clause 11 of the Annexure attached with the order) and this debit was therefore added to the total income of the assessee as unproved and as the assessee himself had not shown the same in the closing stock proving that the debit of Rs 30,532.00 was wrong. The remaining amount of the items which were not shown in the closing stock (as per Clause 9 of the Annexure attached with the order) i.e Rs.37,535.00 out of the total amount of Rs. 68,067.00 was added to the total income of the assessee as under-statement of closing stock, in view of the ITO's finding out that the said amount which was included in the items of Rs. 68,067.00 which should have been shown in the closing stock, was not so shown. The question of the item being ascertained at the stage of closing of the stock and not being found there, clearly postulates that there were no sales of such item, because, if sales were already effected, then there would be no question of such item being shown in the closing stock and no need for an observation that the item should have been shown in the closing stock, but was not shown. It is in this context that in the quantum appeal before the Tribunal, it was noted that as regards the verifiable purchase of Rs. 37,535.00, though they were recorded in the books, they were not traceable in the sales or closing stock. It was held that so far as the purchases were not traceable in closing stock and sales, the natural inference was that the purchased goods were sold outside the books.

We have narrated above the basis of initiation of the penalty proceedings reflecting from the order of the ITO as regards the item of Rs, 37,535.00 viz. - that

though purchases were shown, the closing stock did not disclose the value of the goods to the said extent, which means that the sales were also not shown, since contentions were canvassed in respect of that item overlooking this basis which is reflected from the order of the ITO, as we will hereafter deal.

4. As regards the Assessment Year 1971-72, the ITO had found in his order dated 17.3.1975 while dealing with the return of income in which the assessee had declared total income of Rs. 43,392.00 that there were serious discrepancies in the stock book, purchases etc. and that the assessee had not entered all sales and purchases in the books of accounts. It was further found that in order to reduce the income earned, the assessee had resorted to, claim for bogus purchases and non-recording of purchases either in sales or stock. It was also found that to adjust the gross profit and quantity account and to bring in certain undisclosed stocks as excess, stocks were shown in regard to certain items. However, the assessee was unable to explain these discrepancies. The Income Tax Officer therefore, concluded that additions as worked out in the assessment order totalling to Rs. 1,92,538.00 were called for. In view of the defects noticed by the ITO, he concluded that real profit could not be ascertained from the books. He therefore, estimated a turnover of Rs. 6 lacs and gross profit at 50 per cent, and made an addition of Rs. 2,06,754.00. The ITO had restricted the addition to higher of the two amounts viz. the gross profit addition in order to avoid double taxation.

The matter was carried in appeal before the AAC, who reduced the rate of gross profit to 35 per cent while retaining the estimated turn over and granted the consequential relief. In further appeal, the Tribunal upheld the decision of the AAC.

5. The IAC in his order made under Section 271(1)(c) of the Act on 22.9.1980, for the A.Y 197-71 held in respect of the amount of Rs. 6,396.00, being item of cash purchases without proof, that these purchases were bogus and in the nature of inflation and therefore, the amount represented concealed income of the assessee. As regards under statement of closing stock amounting to Rs. 52,535.00, it was noticed that it comprised of two items namely Rs. 37,535.00 being additions made by the ITO and sustained by the Tribunal and Rs. 15,000.00 being gross profit estimated by the Tribunal. The IAC relying on the order of the Tribunal in the quantum appeal, held that levy of penalty on the said amounts was justified. He

found that in view of various discrepancies, errors, omissions and manipulations and want of supportive evidence in regard to various items of purchases and or sales or stock, the assessee's case clearly fell within the mischief of penal provision. He therefore, imposed penalty of Rs. 75,400.00 so far as Assessment Year 1970-71 was concerned.

As regards Assessment Year 1971-72, the IAC came to the conclusion that the assessee's case was fully covered by the explanation to Section 271(1)(c) of the Act, in view of the defects mentioned by the ITO, which we have noted above. He therefore, imposed penalty of Rs. 1,16,754.00 on the assessee.

6. Being aggrieved by the penalty orders made in respect of the two assessment years i.e. 1970-71 and 1971-72, the assessee approached the Tribunal and the Tribunal after considering the rival submissions, held as regards the assessment year 1970-71 that the amount of Rs. 6,897.00 which represented inflation in purchases resulting in reduction of taxable income of the assessee was clearly exigible to penalty. So far as the item of Rs. 52,535.00 was concerned, which included the item of profit element estimated by the Tribunal in the quantum appeal of Rs. 15,000.00, over and above the item of Rs. 37,537.00 of the value of goods restored by the Tribunal in the quantum appeal, the Tribunal held that the levy of penalty on the sum of Rs. 37,537.00 was justified on the facts of the case and upheld the decision of the IAC to that extent. As regards the amount of Rs. 15,000.00 which was added in the quantum appeal by the Tribunal by way of the estimated possible realisation of profit from the sale of the stock, which was not disclosed by the assessee and which was inferred to have been sold, it was held that though the addition might be justified in the quantum appeal, the said amount was not exigible to penalty in view of the decision of the Supreme Court in D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat II, reported in 86 ITR 557 and of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji, reported in 85 ITR 77.

7. As regards the Assessment Year 1971-72, the Tribunal observed that the ITO on detailed enquiries found that there were bogus purchases, the purchases not reflected in sales or closing stock and also cash purchases, and unaccounted for purchases amounting to Rs. 1,92,538.00 and had adopted the course of making addition by estimating the gross profit as also the turn over. It was noted that the addition was not the one made for want

of verificatory records but based on specific defects pointed out by the ITO. In other words, the gross profit addition which was made in lieu of specific additions noted by the ITO was based on specific defects such as discrepancies and manipulations in the accounts noted in great detail by the ITO in his order. Relying upon the decision of this Court in the case of CIT Vs. S.P. Bhatt, reported in 97 ITR 440, the Tribunal therefore, up-held the decision of the IAC for imposing the penalty for the Assessment Year 1971-72.

8. It was also contended before the Tribunal that the IAC himself had not levied the penalty, but had directed the ITO to do so and the Tribunal held that though the order was not happily worded, the proceedings were not vitiated and that it really amounted to imposition of penalty by the IAC. The Tribunal found that the IAC who had jurisdiction to levy the penalty, had exercised his jurisdiction to levy that penalty in the course of the proceedings, which were conducted by him. The Tribunal therefore, partly allowed the appeal in respect of the Assessment Year 1970-71 and dismissed it in respect of the Assessment Year 1971-72, by its order dated 5th March, 1972, which has led to the aforesaid questions being referred for the opinion of this Court.

9. It has been contended by the learned Counsel appearing for the assessee that it was not possible having regard to the nature of purchases and sales of the type of goods i.e. ball bearings, mill stores etc. which were made by the assessee, to maintain the quality record. It was argued that the basis for initiation of the penalty in respect of the year 1970-71 was inter-alia under statement of the closing stock to the extent of Rs. 37,535.00 and because in the quantum appeal the Tribunal had estimated the profit of Rs. 15,000.00 on the footing that the goods must have been sold away, it should follow that the basis that the goods were not shown in the closing stock on which the penalty proceedings were initiated by the ITO was changed and the basis now as per the decision of the Tribunal in quantum appeal was, non-disclosure of sale. It was contended that since the basis of levy of penalty had thus undergone a change in the quantum appeal, the penalty could not be sustained because under-valuation of the closing stock and suppression of sales cannot co-exist. Reliance was placed by the learned Counsel on the decision of this Court in CIT Vs. Lakhdhir Lalji (supra) in support of his submission. In Lakhdir Lalji's case, the ITO had added a sum of Rs. 58,000.00 holding that the assessee

had realised it by sale of 1,383 bags of garlic, but concealed the same. Notice to the assessee was issued under Section 274 of the Act for levying penalty for concealing of income. On appeal from the assessment order, the AAC held that 1,383 bags of garlic were included in the stock of the assessee and that a sum of Rs. 34,000.00 should be added on the footing of under-valuation of stock and not Rs. 58,000.00. The IAC in the penalty proceedings took note of the AAC's order and levied a penalty of Rs. 74,000.00 on the footing that the assessee had deliberately furnished inaccurate particulars of his income. The Appellate Tribunal held that the order of the IAC was without jurisdiction as his jurisdiction was restricted to those items of concealment of income in regard to which the Income Tax Officer was satisfied that there was concealment of income. The High Court held that penalty proceedings had been commenced against the assessee on a particular footing, viz., concealment of particulars of income, but the final conclusion for levying the penalty was based on a different footing altogether viz., on the footing of furnishing inaccurate particulars of income. It was held that under these circumstances, it could not be said that the assessee had been given a reasonable opportunity of being heard before the order imposing the penalty was passed. The very basis for the penalty proceedings against the assessee initiated by the Income Tax Officer disappeared when the Appellate Assistant Commissioner held that there was no suppression of income by the assessee. The conclusion of the Tribunal that the Inspecting Assistant Commissioner had no jurisdiction to impose a penalty under Section 271(1)(c) for concealment of income was therefore, held to be correct.

The learned Counsel also read before us the decisions of this Court in CIT, Gujarat-III Vs. Manu Engineering Works, reported in 122 ITR 306 and K.M. Bhatia (Quarry) Vs. Commissioner of Income Tax, reported in 193 ITR 397, in which the ratio of the decision of this Court in Lakhdhir Lalji's case was reiterated. There can obviously be no dispute about a proposition that if the very basis for the penalty proceedings against the assessee initiated by the ITO disappeared, then the penalty imposed on a different footing altogether cannot be sustained.

As regards the Assessment Year 1971-72, the learned Counsel for the assessee contended that since the Department had rejected the books of account and made lumpsum addition which was reduced in appeal, it was purely a case of estimation attracting no penalty

provision. It was contended that the fact that the addition ultimately sustained was much lower than the amount which according to the ITO was required to be added to the income itself, shows that the finding of bogus purchases were not approved by the Appellate Authority. It was contended that since the addition was on pure estimate basis and there being no proof of any fraud committed by the assessee, the penalty cannot be sustained. Reliance was placed in support of this contention on the decision of this Court in CIT Vs. S.P.Bhatt, reported in 97 ITR 440, in which case this Court held that the conditions which attract the applicability of Section 271(1)(c) of the Act was that the ITO should be satisfied in the course of any proceeding under the Act that any person had concealed the particulars of his income or furnished inaccurate particulars of such income. The Explanation to that provision, which was introduced by the Finance Act, 1964, provides that where the total income returned is less than eighty per cent of the total income assessed, the assessee shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of Section 271(1)(c) of the Act. The Explanation creates a legal fiction if the condition of its applicability is satisfied. It was held that the condition is an objective condition, namely - that the total income returned by the assessee should be less than eighty per cent of the total income assessed, and the assessee is straightway brought within the penal provision in Section 271(1)(c) of the Act. However, this legal fiction could be displaced if the assessee proves that the failure to return the correct income did not arise due to any fraud or gross or wilful neglect on his part. In that case, the finding reached by the Tribunal was that there was no fraud or gross or wilful neglect on the part of the assessee. It was not the case of the ITO that any particular entries in the books of account were false or any particular items of purchase or sale were omitted to be entered in the books of account. The Court came to the conclusion that the failure to return the total assessed income was not on account of any fraud or gross or wilful neglect on the part of the assessee. It was held that where assessment was made on the basis of an estimate and there was nothing on record to show that any particular entries in the books of account were false or incorrect or any particular items of purchase or sale were omitted to be entered in the books of account, the assessee must be held to have discharged the onus which

rests upon him, that the failure to return the total income assessed was not on account of any fraud or gross or wilful neglect on his part. The learned Counsel also read before us the other decisions of this Court in the case of CIT Vs. Sharadchandra Harilal, reported in 197 ITR 315 and CIT Vs. Subhash Trading Company, reported in 221 ITR 110, which followed the ratio in the case of CIT Vs. S.P. Bhatt's case (supra), with which we are in respectful agreement.

The learned Counsel appearing for the Revenue contended that the basis of initiation of penalty had not undergone any change in respect of the penalty imposed for Assessment Year 1970-71. He submitted that even for the Assessment Year 1971-72, since the Explanation was attracted and there were clear findings as to bogus purchases, sales etc. and manoeuvring of accounts and since the presumption regarding concealment and inaccuracy of particulars of income was not rebutted by showing that there was no fraud or gross or wilful neglect on the part of the assessee, the penalty imposed was justified. He relied upon the decision of the Supreme Court in the case of Commissioner of Income Tax (Addl.) Vs. Jeevan Lal Sah, reported in 205 ITR 244, in which it has been held that rule regarding burden of proof enunciated in CIT Vs. Anwar Ali [1970] 76 ITR 696 (SC), was no longer valid and that whether it was a case of undisclosed or unexplained cash deposit or any other concealment, the standard was the same. It was held that the principle enunciated in CIT Vs. Anwar Ali's case that mere rejection of the explanation of the assessee was not sufficient for levying penalty no longer holds good and it was no longer necessary that the Department must go further and establish that there was conscious concealment of particulars of income or a deliberate failure to furnish accurate particulars. It was further held that the cases to which the Explanation was attracted have to be decided in the light of the law enunciated in the cases of CIT Vs. Mussadilal Ram Bharose [1987] 165 ITR 14 (SC) and CIT Vs. K.R. Sadayappan [1990] 185 ITR 49 (SC). The Hon'ble Supreme Court held that the Explanation to sub-section (1) of Section 271 added by the Finance Act, 1964 shifts the burden of proof to the assessee in the situation covered by it and once the returned income was shown to be less than 80 per cent of the total income assessed, the presumption comes into play and then the burden shifts to the assessee to establish that his failure to return the correct income was not on account of any fraud or gross or wilful neglect on his part and if he fails to establish the same, the presumption will become a finding

and it would be open to the authority to levy the penalty. But, if the assessee establishes that his failure to return the correct income was not on account of any fraud or any gross or wilful neglect on his part, it is evident, no penalty can be levied.

In CIT Vs. Mussadilal Ram Bharose (supra), the Hon'ble Supreme Court had held that if the returned income was less than 80% of the assessed income, the presumption was raised against the assessee that the assessee was guilty of fraud or gross or wilful neglect as a result of which he had concealed the income, but this presumption can be rebutted. The rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body, bearing the aforesaid principles in mind, comes to the conclusion that the assessee has discharged the onus, it becomes a conclusion of fact and no question of law arises.

11. Since the penalty proceedings under Section 271(1)(c) of the Act relate to the Assessment Years 1970-71 and 1971-72, we may reproduce the provision to the extent it is relevant for these proceedings and as it stood at the relevant time.

"271. Failure to furnish returns, comply with notices, concealment of income, etc.-- (1) If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person--

(a) xxx xxx xxx
(b) xxx xxx

(c) has concealed the particulars of his income or [***] furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,--

(i) xxx xxx xx
(ii) xxx xxxx xxx

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have

been concealed or inaccurate particulars have been furnished.]

3 [Explanation.-- Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under Section 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section.]

(2) xxx xxx

It is clear that the proceedings can be initiated under Section 271(1) of the Act, only if the ITO or the AAC, is satisfied in the course of any proceedings under the Act. If he is satisfied as per clause (c) that any person has concealed the particulars of his income or has furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty the sum mentioned in sub-clause (iii) of Clause (c). The expression used in Clause (c) is "has concealed the particulars of his income" or "furnished inaccurate particulars of such income". Therefore, both in cases of concealment and inaccuracy, the phrase "particulars of income" is used. It will be noted that as regards concealment the expression in Clause (c) is "has concealed the particulars of his income" and not "has concealed his income". It is obvious that the penal provisions would operate when there is a failure of duty, to disclose fully and truly particulars of income, imposed under the Act and the Rules thereunder. The duty is enjoined upon a person to make a correct and complete disclosure of his income and it is only when he fails in his duty by not disclosing his income or part thereof, he conceals the particulars of his income. The duty is enjoined upon him to make a complete disclosure of his income as well as a correct disclosure. Therefore, if the disclosure made of the particulars of income is incorrect, then also he commits breach of his duty. Such defaults entail the penal consequences contemplated by

Section 271(1)(c)(iii) of the Act.

12. Under Section 139(1) of the Act as it stood at the relevant time, it was inter-alia provided that every person, if his total income in respect of which he is assessable under the Act during the previous year, exceeded the maximum amount which was not chargeable to Income Tax, shall furnish a return of his income in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. It was therefore, obligatory on a person whose total income exceeded the maximum amount which was not chargeable to income tax, to furnish a return of his income during the `previous year', in the prescribed form. Such return is required to be verified in the prescribed manner. Not only is he obliged to furnish return of his income, meaning thereby to disclose fully and truly all his income, but he is also required to set forth `other particulars' as may be prescribed. The word `prescribed' as defined by Section 2(33) of the Act means, `prescribed by the Rules under the Act'. The forms are accordingly prescribed by the Rules framed under the Act. Section 140 of the Act lays down as to by whom such return can be signed and verified.

Rule 12 of the Rules framed under the Act prescribes the forms in which the return of income is required to be furnished. The return is required to be verified in the manner indicated in the form. By such verification the assessee declared to the best of his knowledge and belief that the information given in the return and the annexures and statements accompanying it was correct and complete and that the amount of total income and other particulars shown therein were truly stated and related to the previous year relevant to the assessment year in question. It was also to be stated therein on solemn declaration that no other income accrued or arose or was received by the assessee and that there was no other income including income of any other person in respect of which the assessee was chargeable to tax under the Act. It will also be noted from the contents of the prescribed forms of the Return of Income that the assessee is required to give various particulars of income under different heads. For example, in the form No.2 of Return of Income prescribed for persons other than companies and those claiming exemption under Section 11 during the relevant Assessment Years, Statement of Total Income in Part-I covered six heads of income namely Salaries, Interest on Securities, Income from House Properties (the particulars of which were to be given as per Annexure-II), Profits and Gains of

Business or Profession, (the particulars of which were to be given as per Annexure III), Capital Gains and Income from Other Sources. The aggregate of items Nos. 1 to 6 was to be shown against item No.7. Thereafter, deductions specified below item 7 were to be made in respect of brought forward loss of earlier year and the balance was to be struck from which amount deductible under Chapter VIA of the Act and the amount of Annuity Deposit were to be deducted, leading to the figure of the Total Income. In Part-II, deductions under Chapter VIA of the Act were to be enumerated for working out the total deduction, which was to be carried to Part-I. In Part III of the Return, Statement of sums included in total income in respect of which income tax is not payable or which qualify for rebate or deduction of income tax was to be furnished with the required particulars. In Part IV, sums which are not included in Part I and claimed to be not taxable were to be stated. Statement of tax deducted at source and advance tax paid was to be furnished at Part V, giving particulars of the advance tax paid against Salaries, Interest on Securities, Other Interest, Dividends and any other income. Statement of particulars required under Section 139(6) was to be furnished as per Part VI. The particulars of Profits and Gains of business which were to be furnished as per Annexure III to the Return show that as many as 37 particulars were to be filled in for working out net Profit or Loss carried to Part I of the Return. As per the Notes below Annexure III, the assessee was required to attach Profit and Loss Account and Balance Sheet and other particulars mentioned in the Note. Statement of particulars regarding depreciation and development rebate was also to be submitted as per Section 2 of Annexure III. At the end of the form the prescribed verification was required to be made, inter-alia to the effect that the information given in the Return and the annexures and the statements accompanying it was correct and complete and that the amount of total income and other particulars shown were truly stated and related to the previous year relevant to the Assessment Year. A statement was also required to be made that no other income accrued or arose to or was received by the assessee. It will thus, be seen that the form of return of income included a variety of particulars to be disclosed and the particulars of income to be disclosed can be seen against the items which related to disclosure of income besides particulars other than those which related to the income of the assessee, such as his name, address, status etc. The forms of returns are obviously prepared in context of the duty of a person to disclose his income from various sources

under various heads of income as statutorily provided and his duty to disclose his total income in the return. The extent of his total income will determine the total income tax liability of a person. "Total income" is defined in Section 2(45) of the Act and it means the total amount of income computed in the manner laid down in the Act. Thus, for arriving at the total income, the income derived from all sources is to be considered as provided by Section 5, when it is received or deemed to be received by a person. Certain incomes which are enumerated in Section 10 of the Act are not included in the total income. All income for the purpose of charge of income tax and computation of total income is required to be classified under distinct heads of income such as Salaries, Income from House Property, Profit and Gains of Business or Profession, Capital Gains and Income from Other Sources, as enumerated in Section 14 of the Act.

The income chargeable to income-tax under the head "Salary" is of the nature of the income indicated in Section 15 of the Act, to be computed after making the deductions mentioned in Section 16. The income under the head " Income from House Property" under Section 22 is to be computed after making deductions mentioned in Section 24. The income chargeable under the head "Profits and Gains of Business or Profession" is to be computed in accordance with the provisions contained in Sections 30 to 43A of the Act, as provided in Sections 28 and 29 thereof. The income chargeable under the head "Capital Gains" is required to be computed after making deductions under Section 48 of the Act. Finally, the income chargeable under the head "Income from Other Sources" is to be computed after making the deductions mentioned in Section 57 of the Act. Thus, under each head of income, there are provisions for deductions which are to be made while computing the income chargeable under that head. It therefore follows that it is an obligatory duty cast upon a person filing the return of income to disclose all his income derived from any source under various heads and indicate the income under each head, which is chargeable to income tax, after making the permissible deductions. Disclosure of income would be disclosure of particulars of income, which a person is duty bound to disclose in fulfilment of his statutory obligations to pay tax on the income chargeable to tax. After the return is filed under Section 139(1) of the Act, the assessment of tax is to be made and for the purpose of making an assessment under the Act, the ITO makes an enquiry contemplated by Section 142 of the Act, in which notice is issued on the person who has made the

return, to produce accounts, documents or furnish verified information in writing including statement of all assets etc. However, where the ITO is satisfied that "the Return is correct and complete", as were the wordings of Section 143(1) at the relevant time, he had to assess the total income without requiring the presence of the assessee or production by him of any evidence that the return is correct and complete, as laid down in Section 143(1) of the Act. Where however, the ITO was not satisfied without the presence of the assessee or production of evidence that "the return is correct and complete", he was required to issue notice enabling the assessee to produce evidence on which he may rely in support of the return. The `total income' is, in such cases of regular assessment assessed after hearing the evidence adduced and considering all material gathered by the ITO as provided in Section 143(3) of the Act. It therefore, follows that in the assessment proceedings under Section 143(2)(3), the ITO can find out whether the return of income was correct and complete. If he holds that the return of income was not correct or that it was not complete in respect of the particulars of income which were required to be stated in the return, he will reach the correct figure of total income and determine the sum payable by the assessee or refundable on the basis of such assessment. If the income chargeable to tax has escaped assessment for any assessment year, by reason of omission or failure of the assessee to disclose fully and truly all material facts necessary for his assessment, reassessment proceeding can be initiated as provided under Section 147 of the Act. This again shows that full and true disclosure of income is a primary obligation of the assessee.

13. It is in the background of these statutory obligations of an assessee to fully and truly disclose his income under various heads and indicate the income under those heads which is chargeable to income tax after making permissible deductions in which the provisions of Section 271(1)(c) which fall for our consideration are to be viewed.

If a person obliged to furnish the particulars of his income, omits to furnish them, he thereby conceals the particulars. This concealment may take various forms. A glaring illustration of concealment would be where the assessee does not disclose or fully disclose in the return, the income derived by him which would fall in a particular head e.g. "Income from Other Sources" while disclosing his income falling under other heads of income prescribed by Section 14 of the Act. To the extent he

does not disclose that income, he conceals the particulars of income. The obligation is not only to disclose particulars of income but to disclose them correctly and completely. If while disclosing the particulars of income in the return he puts them under a wrong head, he can be said to be furnishing inaccurate particulars of income. The particulars of income can be made inaccurate in variety of ways, a glaring illustration of which would be where the assessee while stating the income under a particular head, works out the income chargeable to tax after making deductions which are falsely made. Such a process would make the particulars of income inaccurate. In all such cases whether the income is not disclosed against the constituent item of the return in which it falls or is partly not disclosed, or the particulars of income given in the return are incorrectly stated by any machination, the impact is bound to be on the figure of gross total income to be mentioned under various heads of income and also on the total income chargeable to tax. In fact, reducing the figure of income that would be chargeable to tax would be the purpose of concealment of particulars of income or giving inaccurate particulars of income. The expression "particulars of income" would have relevance to all the particulars of income which the assessee is required to give in his return fully and truly including the particulars of income chargeable to tax under various heads and the total income. Therefore, any concealment or inaccuracy in the particulars of income in the return occurring at any stage upto and inclusive of the ultimate stage of working out of total income would attract the penalty provision of Section 271(1)(c) of the Act. Every figure in the return which is set opposite to the item of income is a particular of income, whether the figure is one which is stated independently of anything else that appears in the return or the documents accompanying it or whether it is something derived from other figures elsewhere stated in such return or documents. False result may be produced by the falsity of one or more of the constituent items in the return. The words inaccurate particulars would cover falsity in the final figure as also the constituent elements or items. They simply would mean inaccurate in some specific or definite respect whether in the constituent or subordinate items of income or the end result.

14. There cannot be a straight jacket formula for detection of these defaults of concealment or of furnishing inaccurate particulars of income and indeed concealment of particulars of income and inaccurate

particulars of income may at times overlap, as for example, when half of the income under a particular head is not at all disclosed, that would be concealed to that extent while the remaining half which is in fact disclosed would, not being his complete disclosure, amount to inaccurate particulars of income as regards that constituent item of the return. By the very nature of the assessment proceedings the ITO while ascertaining the total income chargeable to tax would be in a position to detect the specific or definite particulars of income concealed or of which false particulars are furnished. Where in the constituents of income returned, such specific or definite particulars of income are detected as concealed, then even in the total income figure to the extent they reflect, it would amount to concealment to that extent. In the same way where specific and definite particulars of income are detected as inaccurate, then such figure will also make the total income inaccurate in particulars to the extent it does not include such income. Whether it be a case of only concealment or of only inaccuracy or both, the particulars of income so vitiated would be specific and definite and be known in the assessment proceedings by the ITO, who on being satisfied about such concealment or inaccuracy of particulars of income would be in a position to initiate the penalty proceedings on one or both of the grounds of default as may have been specifically and directly detected. The opportunity of hearing given by the notice under Section 271(1)(c) of the Act, obviously is against such concealment and inaccuracy as is detected in the assessment proceedings. This is why it has, with respect, been rightly held in the decision of this Court in Lakhdhir Lalji's case (supra) that the basis of the issuance of notice should remain the same while imposing penalty. If the notice is issued in context of concealment of income, then the penalty cannot be levied by shifting the basis to inaccuracy of particulars. This is to ensure that the assessee gets an adequate opportunity in respect of the default which is detected and alleged against him and which forms the basis of the issuance of the notice under Section 271(1)(c) of the Act and to ensure that he is not put to peril of answering against something which never was specifically determined as his default or in respect of which no notice was issued by the ITO, whose satisfaction alone mattered at the stage of the initiation of the penalty proceedings.

15. The ITO, as noted above, had found in respect of the year 1970-71 from the scrutiny of reconstituted stock book that there were discrepancies. It was held that there were items costing Rs. 68,087.00 which should have

been shown in the closing stock, but were not shown. This clearly postulates that there were no sales of these items shown in that year and that is why they ought to have been shown in the closing stock. When the purchases were vouchered and the stock reconstructed by the assessee did not, as per the very material prepared by the assessee through his Auditor, show any stock or sales corresponding to such purchases as found by the ITO in the quantum proceedings and noted by the Tribunal in the appeal in the quantum proceedings, the income of the assessee was concealed to the extent that it stood reduced by not showing the value of purchases in the closing stock or sales. The profit and gains of business disclosed in the return were therefore less because the purchases shown remained on the debit side without corresponding amount on the credit side by stating the value of the closing stock or the sales and reaching the profit figure by substracting the debit side from the credit side. The income not shown by this process obviously was concealment of particulars of income. Even if it was to be treated as inaccurate particulars of income as argued by the learned Counsel, there would at the best be overlapping of the two defaults and it will nonetheless remain concealed particulars of income to the extent that the subconstituent income was not disclosed in the return. The penalty proceedings did not transgress this basis of its initiation and no penalty was imposed on the additional concealment of particulars of income i.e. non disclosure of the estimated profit arising out of the inferential sale. Admittedly, nowhere during the quantum or penal proceedings did the assessee ever assert that the stock was in fact available. The ITO on the contrary, on the basis of the data prepared by the assessee, found that the value of stock should have been there in the closing stock which observation could be made only when there were no sales of such goods till the end of the year. Even the ITO could have gone further and added the income by way of estimated profit by inferring sale from the fact that the value of the stock was not shown in the closing stock by the assessee. But he did not do so and made the non-disclosure in the closing stock a basis for issuing notice both for concealment and inaccurate particulars of income. The Tribunal in the appeal in quantum proceedings on the same basis namely that the purchases were not traceable in the closing stock and sales, drew only an inference that the purchased goods were sold outside the books. It observed that the ITO had actually added the cost price of the articles eventhough he could very well have made an addition on account of the realisable profit on these purchases and on that basis assessed the estimated income

on the basis of gross profit returned by the assessee. The Tribunal in terms sustained an addition to the extent of Rs. 37,535.00 made by the ITO and only added a further amount of Rs. 15,000.00 by drawing a "natural inference" that the purchased goods must have been sold away and profit realised. In the penalty proceedings, only the basis that was adopted by the ITO in respect of the specific and direct item of concealment of particulars of income i.e. Rs. 37,535.00 for initiating the penalty proceedings was adopted as the basis by the Tribunal for imposing the penalty and the addition of Rs. 15,000.00 made by the Tribunal in the quantum appeal on account of realisable profit on inferential sale of such under valued stock, was not made the basis for restoring the penalty. There was therefore, neither any shift of that basis in the quantum appeal nor in the appeal before the Tribunal from the penalty proceedings. The argument of shift in basis was raised on an inaccurate statement in paragraph 15 of the Tribunal's decision in the penalty appeal, in which it made an observation that this addition was restored by the Tribunal in quantum proceedings on the ground that purchases were recorded in the books and found in the stock book. The learned Counsel after verifying the Tribunal's order very fairly stated that there was no statement in the Tribunal's order in quantum appeal that the purchases were found in the stock book. As there was no change in the basis on which the penalty proceedings were initiated on the ground that there was concealment of particulars of income or furnishing inaccurate particulars of income, and, the assessee did get complete opportunity of hearing in respect of the specific constituent of the income on which the penalty was levied, the above decisions relied upon in favour of the assessee cannot help the assessee.

16. To say that when the Department on the basis of the purchases not being traced in the closing stock or sales draws an inference that they were sold, it should be assumed that stock was in fact found and therefore, there was no concealment of particulars of income by not showing the purchases in the closing stock, is to say the least putting premium on an established dishonesty. Even the inference drawn that the goods not disclosed in the closing stock must have been sold and fetched profit would not displace the finding that the goods were in fact not shown in the closing stock. The purchases not being traced in the closing stock was a fact found since there were in fact no sales. That basis never changed even when the Tribunal in quantum appeal drew a "natural inference" that the goods which were not traceable in the closing stock must have been sold in order to work out

the realisable profit. In our view, since the penalty was confined to the basis of concealment of particulars of income to the extent of Rs. 37,535.00, the contention of the learned Advocate that the basis had changed, cannot be accepted.

17. As regards the item of Rs. 6,937.00, the Tribunal held that as it represented inflation in purchases, inasmuch as though purchases had been inflated on the purchase side, the items were not shown in the stock book or sales and since the amount related to inflation of purchases which had resulted in reduction of taxable income, the amount in question was clearly exigible to penalty. The ITO had found that there were no names or vouchers nor details as to the nature of goods for many of these purchases, and, no receipts for payment of the same were produced. In our view therefore, the Tribunal has not committed any error in holding that the said amount was exigible to penalty under Section 271(1)(c) of the Act.

18. As regards the Assessment Year 1971-72, we note that the Tribunal considered the aspect that the ITO had, after a detailed enquiry, found that there were bogus purchases made by the assessee, that purchases were not reflected in sales or closing stock and that cash purchases as well as unaccounted purchases to the extent of total Rs. 1,92,538.00 were made. We may note that the basis for the addition of gross profit criteria was the specific defects, discrepancies, manipulations etc., which were noticed by the ITO in the accounts of the assessee. It was found that the addition to the gross profit was not made merely for want of certain verificatory records, but was based on specific defects pointed out by the ITO and the ITO in all fairness had made the addition by estimating the gross profit in place of the specific additions actually noted by him. There is no dispute about the fact that in respect of the said assessment year 1971-72, the Explanation to Section 271(1) of the Act was attracted and the assessee was required to discharge the burden of proving that the concealment or inaccuracy in the particulars of income did not arise from any fraud or any gross or wilful neglect on its part. As can be seen from the Explanation to Section 271(1) of the Act, which prevailed at the relevant time, that where the total income returned by any person is less than eighty per cent of the total income referred to as the correct income as assessed under Sections 143, 144 or 147 reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income, but

which has been disallowed as a deduction, such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of the said sub-section. Therefore, the presumption by this deeming fiction is that when the Explanation is attracted, it will be presumed that such person has concealed the particulars of his income or furnished inaccurate particulars of such income, unless he discharges the burden of proving that the failure to return his correct income did not arise from any fraud or any gross or wilful neglect on his part. In the present case, there are clear findings of the ITO as noted above, that in respect of the year 1971-72, the assessee had not entered all sales and purchases in the books of account, that bogus purchases were shown, that there were serious discrepancies in the stock book, that excess sales were shown while the purchases were not shown and further that in order to reduce the income earned, the assessee had resorted to claim for bogus purchases and non-recording of purchases either in sales or stock. In face of all these findings, it can never be said that the assessment was made on the basis of an estimate without there being on the record enough material to show that any particular entries in the books of account were false or incorrect or any particular items of purchases or sales were omitted to be discharged in the books of account. Therefore, the decision in S.P. Bhatt's case (supra) cannot be invoked by the assessee and it can never be said that the burden which lay on the assessee was discharged so as to rebut the presumption arising under the Explanation that the assessee had concealed the particulars of income or furnished inaccurate particulars of income. We therefore, do not find any error committed by the Tribunal when it holds that the levy of penalty on the assessee in respect of the Assessment Year 1971-72 was fully justified.

19. Now coming to the last contention, canvassed on behalf of the assessee for both the years, that the order of the IAC was not an order imposing penalty and was only a direction to the ITO to levy penalty, we may first note the exact wordings in which the order is made, which is reproduced hereunder:-

> "13. For A.Y. 1970-71, the minimum penalty leviable is Rs. 75,400.00 and the maximum Rs. 1,50,800.00. I direct the ITO to levy minimum penalty of Rs. 75,400.00 and issue necessary

demand notice and challan for the same.

14. For A.Y 1971-72, the minimum penalty leviable is Rs. 1,16,754.00 and the maximum penalty leviable is Rs. 2,33,508.00. I direct the ITO to levy minimum penalty of Rs. 1,16,754.00 and issue necessary demand notice and challan for the same."

There is no dispute about the fact that the penalty proceedings were conducted before the IAC and he took into consideration the contentions which were raised by the assessee against imposition of penalty in respect of both these Assessment Years. After reaching its finding in the body of the order, the IAC in respect of Assessment Year 1970-71 held that the minimum penalty leviable was Rs. 75,400.00 and the maximum Rs. 1,50,800.00 and he directed the ITO to levy minimum penalty of Rs. 75,400.00 to be levied by the ITO and issue necessary demand notice. By similarly worded order, he directed the ITO to levy minimum penalty of Rs. 1,16,754.00 for the Assessment Year 1971-72 and issue necessary demand notice and challan for the same. It is contended that the words "I direct the ITO to levy" would mean that the penalty is not imposed by the IAC himself and that he has left it to the ITO to levy the minimum penalty. Such a reading of the order would not at all be warranted, because, it is clear that the IAC himself has fixed the minimum penalty for both the Assessment Years as indicated in its orders - viz. Rs. 75,400.00 for the Assessment Year 1970-71 and Rs. 1,16,754.00 for the Assessment Year 1971-72, leaving no scope whatsoever for the ITO to fix and impose any penalty. If the orders are read in proper light in the background of the proceedings which were heard by the IAC, these orders only mean that the IAC had imposed these penalties which were required to be recovered by issuing necessary demand notice by the ITO. They would mean that the minimum penalties which were levied by the IAC were required to be recovered by the ITO by issuing necessary demand notice. It will be noted that under Section 274(2) of the Act, the ITO has to refer the case to the IAC, where the minimum penalty imposable exceeded the amount mentioned therein and the IAC in such cases has all the powers conferred under the Act for the imposition of penalty. The penalty proceedings were accordingly heard by the IAC and he gave the said decision. As provided in Section 271(1)(c) of the Act, the ITO may direct that the person who commits the default, shall pay the penalty which would not be less than and will not exceed the amount mentioned in sub-clause (iii). The IAC has similar powers by virtue

of Section 274(2) of the Act and therefore, he also could direct that such persons shall pay by way of penalty the amount which would not be less than and should not exceed twice the amount of income as contemplated by sub-clause (iii) of Clause (c) of Section 271(1) of the Act, which operated at the relevant time. The orders made by the IAC must necessarily be read as the orders by which he directed at the end of the proceedings that the assessee shall pay the amount of minimum penalty mentioned in these orders. There is no question of any delegation of power to the ITO because no discretion whatsoever was left to the ITO, who had only to issue demand notice as required by Section 156 of the Act, which, inter-alia, lays down that when any penalty is payable in consequence of an order passed under the Act, the ITO shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable. Rule 15 of the Rules framed under the Act, prescribes the necessary form in this regard and as per that Form No.7, the concerned person was to be informed, all the details of such penalty determined to be payable by him. The assessee has not produced any such notice of demand, though its learned Counsel fairly stated that such notice was received pursuant to the penalty orders and the amounts have been paid up. It will be noted from item No.9 of Form No.7 that the particulars of the amount due as a result of the order of Appellate Assistant Commissioner of Income Tax/Inspecting Assistant Commissioner of Income-tax/Commissioner of Income-tax, were to be mentioned. Therefore, the ITO was only required to issue the demand notice pursuant to the minimum penalty which was required to be paid by the assessee as a result of the order made in the penalty proceedings by the IAC. We are not prepared to read this order so as to mean that the IAC did not impose himself the penalty and left it to the ITO to impose the same. Even if the order is not happily worded as observed by the Tribunal, it is clear enough to indicate that the penalty is in fact imposed by the IAC under this order and all that he has done is that he directed the ITO to issue demand notice in respect thereof. We may only note that as provided by Section 292B of the Act which was inserted with effect from 1.10.1975 i.e. prior to the passing of the order by the IAC on 22.9.1980, no assessment or other proceedings made in pursuance of the provisions of the Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in such assessment or other proceedings which is in substance and effect in conformity with or according to the intent and purpose of the Act. In our view, there is hardly any defect in the issuance of the order and it should be read, as clearly

it is, an order imposing penalty in respect of which demand notice was required to be issued by the ITO and nothing else.

20. In view of what we have said hereinabove, we hold that the Tribunal has not committed any error as sought to be contended on behalf of the assessee and therefore, all the questions which have been referred to the Court and are reproduced above, are answered in the affirmative, against the assessee and in favour of the Revenue. The reference is disposed of accordingly with no order as to costs.

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